(30)

IN THE

Supreme Court of the United States

OCTOBER TERM—1944

No. 1068

EDNA BENTON WAKE WYMAN and EDWARD B. BARTLETT, as Executors under the Last Will and Testament of Edward E. Wyman, deceased,

Petitioners,

against

PAN AMERICAN AIRWAYS, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF

ROBERT E. COULSON,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, EDNA BENTON WAKE WYMAN and EDWARD B. BARTLETT, as Executors under the Last Will and Testament of Edward E. Wyman, deceased, respectfully pray for a Writ of Certiorari to review the final judgment of the Supreme Court of the State of New York, wherein it was adjudged that the liability of the respondent for the wrongful death of petitioners' testate under "Death on the High Seas Act" (Title 46, United States Code, Section 761) was limited to $8,300.00 pursuant to Article 22 of the Convention for the Unification of Certain Rules Relating

to International Transportation by Air, and Additional Protocol signed at Warsaw, Poland, October 12, 1929 (otherwise known as the Convention of Warsaw), and which Convention was adhered to on behalf of the United States of America by proclamation of the President, dated October 29, 1934 (49 Stat., Pt. 2, at p. 3000).

OPINIONS OF THE COURTS BELOW

Opinion of the Supreme Court of the State of New York, County of New York, Schreiber, *J.*

(Pages 122 to 124 of the Record, reported in 43 N. Y. Supp. 2d, 420)

"Wyman (Edward E. Wyman, dec'd) *v.* Pan American Airways, Inc.—Plaintiffs' testator, enroute from San Francisco to Hongkong as a passenger on board the 'Hawaii Clipper,' was lost in the disappearance without trace of that aircraft over the South Pacific Ocean on or about July 29, 1938. Defendants, now merged, owned and operated the plane.

The rights of the parties are fixed by the rules for 'International Air Transportation' established and concluded at Warsaw, Poland, on October 12, 1929, at a convention of nearly all governments, including the United States. Final adherence to this international treaty on the part of the United States was proclaimed by the President on October 29, 1934 (49 Statutes at Large, Part 2, p. 3000), which thus becomes part of the law of the land (United States Constitution, Art. VI; United States *v.* Belmont, 301 U. S., 324), superseding state law (Moscow Fire Ins. Co. *v.* Bank of N. Y., 280 N. Y., 286; Conklin *v.* Canadian Colonial Airways, 266 N. Y., 244). The said rules were made a condition of the ticket herein (Murray *v.* Cunard SS. Co., Lim.,

235 N. Y., 162) and in any event are so made under the rules themselves (Art. 3, subdiv. 2).

The Warsaw Convention rules are applicable only to international flights (Art. 1) and raise a presumption of liability on the part of the carrier for injury or death to a passenger (Arts. 17, 20) limited to 125,000 francs or approximately $8,300 under the rate of exchange fixed (Art. 22) except where the carrier is guilty of "wilful misconduct" (Art. 25).

There was no proof in this case of "wilful misconduct" on the part of the defendant (Wass *v.* Stephens, 128 N. Y., 123; Brown *v.* Garey, 267 N. Y. 167), and, indeed, no proof of any negligence connected with or a proximate cause of the accident (Kalinowski *v.* Ryerson & Son, Inc., 242 App. Div., 43, aff'd 270 N. Y., 532). Nor, in view of the circumstances, were defendants able to offer any proof in rebuttal of the presumption of liability (Art. 20).

The case at bar would thus seem to be within the very situation embraced by the rules of the Warsaw Convention which here operate to permit a recovery that otherwise might be impossible for want of proof. On these considerations at the conclusion of the trial, a verdict was directed for plaintiffs in the sum of $8,300, in accordance with the rules stated.

Plaintiffs now move to set aside this verdict as inadequate. It is said that, as the aircraft was lost on a leg of the flight between Guam and Manila, both within the jurisdiction of the United States, the flight was not international and the Warsaw Convention rules are inapplicable. The original place of departure, however, was San Francisco, California, U. S. A., and the final destination Hongkong, China. So the ticket purchased by the deceased reads. This is specifically controlling (Article 1, subdivision 2, Warsaw Convention) despite breaks in travel en route (Grein *v.* Imperial Airways, Ltd., [1930] 1 K. B. 50). The contention

that defendants failed to prove legal authorization to operate in also without merit. Compliance with the law is always to be assumed unless the contrary is proven. (Anderson *v.* Erie RR., 223 N. Y., 277).

There remains to be considered whether interest may be allowed on the judgment. The right to bring a death action is purely statutory. It did not exist at common law (Debevoise *v.* N. Y. L. E. & W. RR., 98 N. Y., 377) and depends upon the existence of a statute creating a right of action at the place where the "force impinged" causing injuries and death (Whitford *v.* The Panama R.R., 23 N. Y., 465; Kristansen *v.* Steinfeldt, 165 Misc., 575; reversed on other grounds (256 App. Div., 824). No new substantive rights were created by the Warsaw Convention and all the rules there laid down are well within the framework of existing legal rights and remedies (Choy *v.* Pan-American Airways Co., 1941 Am. Mar. Cas., 483).

The right to any recovery in this action thus must depend on some statute. The New York Decedent Estate Law (section 130) can have no application as the injury and death did not occur within the territorial confines of the state (Whitford *v.* The Panama R.R., *supra*). The only possible relevant statute, therefore, is the federal "Death on the High Seas Act" (Title 46, U. S. Code, section 761), similar in effect to other statutes giving such right of action. This statute is applicable to airplane accidents on the high seas (Choy *v.* Pan-American Airways Co., *supra*) and that an action thereon may be maintained in the state courts has been held by the Appellate Division in this case (262 App. Div., 995). As the said statute contains no provision for interest, it follows that interest may not be allowed on the verdict herein (Murmann *v.* N. Y., N. H. & H. RR., 258 N. Y., 447; Norton *v.* Erie RR., 163 App. Div., 468). Motion to set aside the verdict is denied, and interest on the said verdict is disallowed."

The judgment of the Supreme Court, New York County, was affirmed by the Appellate Division of the Supreme Court of the State of New York without opinion in 267 App. Div. 947.

The Court of Appeals of the State of New York granted leave to appeal from the judgment by order dated June 14, 1944 (293 N. Y. 273).

The judgments were affirmed by the Court of Appeals of the State of New York without opinion by order dated December 30, 1944. The decision of affirmance is not yet reported.

Jurisdiction

The date of the decision of the Court of Appeals of the State of New York, of which review is here sought, is December 30, 1944. The remittitur of the Court of Appeals is dated December 30, 1944. The order making the order of affirmance of the Court of Appeals the order of the Supreme Court of the State of New York was entered in the Supreme Court of the State of New York, County of New York, on the 15th day of January, 1945. Judgment on the remittitur was entered in the Supreme Court of the State of New York on the 25th day of January, 1945.

The jurisdiction of this Court is invoked under Judicial Code, Section 237, (a) and (b), United States Code, Title 28, Section 344(b). There is here involved the interpretation to be given to a Treaty of the United States of America, to wit: the Warsaw Convention, which respondent claimed granted to it a partial immunity from liability. The treaty was specifically pleaded in the answer of the respondent and was the sole basis of decision from which review is sought.

The Treaty Involved

The treaty involved is the Convention for the Unification of Certain Rules Relating to International Transportation by Air and Additional Protocol signed at Warsaw, Poland, October 12, 1929 (otherwise known as the Warsaw Convention) and which Convention was adhered to on behalf of the United States of America by proclamation of the President, dated October 29, 1934 (49 Stat., Pt. 2, at p. 3000).

Article 22 of the Convention provides:

> "(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs.* Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.
>
> * $8,291.87 at par of $.066335
>
> (2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs* per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.
>
> * $16.58 at par of $.066335
>
> (3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs* per passenger.
>
> * $331.67 at par of $.066335

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures."

Article 25 provides:

"(1) The carrier shall not be entitled to avail himself of the provisions of this Convention, which exclude or limit his liability if the damage is caused by his willful misconduct or by such default on his part as, in accordance with the law of the Court to which the case is submitted, is considered to be equivalent to willful misconduct.

(2) Similarly, the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment."

Summary Statement of Matter Involved

The action was one for the wrongful death of Edward E. Wyman, who perished by reason of an airplane accident during a flight from Guam to Manila in 1938.

In July of 1938, the respondent owned and operated the airplane "Hawaii Clipper" as a carrier of passengers for hire between Alameda, California, and Hongkong, a British Crown Colony in China (fol. 110).

The deceased booked passage on the plane for a flight scheduled to leave Alameda, California, for Hongkong, China, on July 23rd (Petitioners' Ex. 1, p. 100). The ticket was purchased in New York (fol. 113). The back of the ticket issued to the testate bore the following legend (Petitioners' Ex. 26, at p. 120 of the Record):

"7. Transportation hereunder shall be subject to the rules relating to liability established by the Con-

vention of Warsaw on October 12, 1929 if such Convention, by its terms, is applicable thereto."

One of the rules of the Warsaw Convention, Article 22, provides that by special contract the carrier and the passenger may agree to a higher limit of liability than the 125,000 francs provided for.

It was conceded at the trial that there was no choice of rates available to prospective passengers whereby one could obtain passage with limits of liability higher than the 125,000 francs or with full liability (fols. 228 and 229 of the Record).

The proof shows that shortly before the plane departed, it underwent an inspection at the respondent's shop in Alameda where it was found that there were "excessive gas leaks and water leaks into front and aft bilges" (fol. 189). The respondent's report stated with respect thereto: "Test seawings and repair as required." The situation was ostensibly remedied (fol. 189) and the ship permitted to depart.

The next stop on the flight was Honolulu, about 2,500 miles away. When the plane arrived there, a check-up revealed that some eight gallons of gasoline had leaked into the bilges (fols. 190, 191).

Apparently nothing was done to remedy the conditions causing the leaks, for when the plane arrived at Wake Island, approximately 2,500 miles away from Honolulu and after an intermediate stop at Midway, 1,300 miles from Honolulu, a check-up once more revealed that gasoline had leaked into the bilges, totalling some four gallons (fols. 193-195). The ship was dispatched onto its next stopping point, the Island of Guam, 1,700 miles away. When it arrived there, once again it was discovered that gasoline had leaked into the bilges, about two gallons (fol. 201). Once more the ship was dispatched on its way to the next stop, Manila, and here again, as in the previous reports of

the presence of gasoline, no mention is made of any repairs referable to the condition responsible for the leaks.

When the plane left Guam for Manila, the weather forecasted was "widely scattered thunder showers over Archipelago" (Petitioners' Ex. 3, p. 112).

While on its journey from Guam to Manila, hourly radio messages were sent ~~by~~ the captain of the plane. These indicated that at intervals he was meeting with turbulent air, squalls, rain and lightning (fols. 158, 159, 160, 164, 170, 172, 173).

Normally, the flight from Guam to Manila is in a straight line (Petitioners' Ex. 4, p. 114; fols. 143, 144, 151). However, on the flight in question, and about the time that squally weather was encountered, the plane began to deviate from the prescribed course, southward (Petitioners' Ex. 4; fols. 146, 147, 148, 149, 163). Use of the southerly course was at the pilot's discretion (fol. 151), and apparently was followed when unfavorable weather conditions beset the normal course. The charted progress of the plane (Petitioners' Ex. 4) indicates that it never returned to the prescribed course.

Weather sequences were radioed from Guam and Manila to the navigator of the plane every half hour. When the fourteenth weather sequence of the journey was radioed, the plane replied to hold it up as it was in rain and clouds and was being bothered by rain static (fol. 173). A few minutes later a second attempt was made to radio the fourteenth weather sequence to the plane, and once more the plane replied to hold it up because of rain and static (fol. 173). That was the last message from the plane. It disappeared, and no trace of it or its occupants was ever found.

The petitioners proved that free liquid gasoline, such as was present in the seawing bilges, generates gasoline vapor which is highly flammable and explosive in character. The

quantity of gasoline vapor generated over free gasoline is wholly independent of the amount of liquid gasoline present (fol. 213). Given an igniting agent, a pint of free gasoline can yield sufficient vapor to cause an explosion equal in destructive effect to a pound of dynamite (fols. 212, 213, 214).

It was conceded that any spark at all could be such an igniting agent (fol. 278). Counsel for the defendant at first conceded that there were innumerable causes in a traveling airplane for the creation of a spark (fol. 277), but then withdrew that concession (fol. 278). Petitioners thereupon offered to prove the variety of ways in which a spark could be initiated in a traveling airplane (fol. 280). The Court stated that petitioners could do so if it became necessary (fol. 281).

In any event, some of the causes for sparks may be gleaned from Petitioners' Exhibit 23, which is an extract from a manual issued by the manufacturer of the airplane in question (fol. 221). The extract reads, as follows (fols. 222, 223):

> "Extreme care must be taken to prevent sparks from electrical apparatus, static electricity, shoes and other causes * * *."

Petitioners contended that, assuming even the applicability of Article 22 of the Convention, the foregoing presented proof of willful misconduct within the purview of Article 25 of the Warsaw Convention which, if found by a jury, would have made unavailing the limited liability provisions of Article 22.

Respondent rested at the conclusion of petitioners' proof, and moved for a directed verdict in petitioners' favor in the sum of $8,300.00, the amount limited by the Convention, and moved to dismiss so much of petitioners' claim as exceeded that amount (fols. 291, 293).

The Trial Justice held that Article 22 of the Warsaw Convention was controlling, and as is apparent from its citation of authority, interpreted the words "willful misconduct" of Article 25 to mean "intended injury" so as to make that Article inapplicable (opinion of Trial Court, fols. 366-367). In its holding that Article 22 is controlling and in its interpretation of willful misconduct contemplated by Article 25, the Trial Court was sustained by the Appellate Division and the Court of Appeals.

Reasons for Issuance of Writ

(1) The Court of Appeals of the State of New York has decided a highly important case in which it necessarily passed upon the applicability of a partial immunity from liability granted by the Warsaw Convention, a treaty of the United States. Apart from the fact that several actions are already pending in the courts of the State of New York, in which the Warsaw Convention has been pleaded as a partial defense, the undoubted increase of airplane traffic after the war will involve frequent attempted applications of the limited liability provisions of the Warsaw Convention. There should be, therefore, a final authoritative disposition of the meaning and application of the Warsaw Convention with respect to the limitation of liability of common carriers engaged in international carriage by air.

(2) This is the first time that the question of the applicability of the Warsaw Convention was presented to the State Court of Appeals, and if this Court grants certiorari, it will be the first time that this Court will consider the question of the meaning to be given to the Warsaw Convention, particularly with respect to Articles 22 and 25, dealing with limitation of liability.

(3) The decision of the Supreme Court of the State of New York as affirmed by decision of the Court of Appeals of the State of New York with respect to the requirement of notice to a passenger that he is traveling under a limited liability contract is in conflict with the decisions of this Court, and in petitioners' opinion, directly in conflict with the decision of this Court in the case of Kensington, 183 U. S. 263; and Majestic, 166 U. S. 375.

Dated, March 16, 1945.

EDNA BENTON WAKE WYMAN and EDWARD B. BARTLETT, as Executors under the Last Will and Testament of Edward E. Wyman, deceased,

Petitioners.

By ROBERT E. COULSON,
Counsel for Petitioners.